

WISHA REGIONAL DIRECTIVE

Department of Labor and Industries

Division of Occupational Safety and Health

2.08 Identities of Witnesses And Interviewed Employees

Date Issued: September 18, 2006

I. Background

In enforcing the obligations of employers under the Washington Industrial Safety and Health Act (WISHA), found in Chapter 49.17 RCW, the Department of Labor and Industries has the authority to conduct workplace inspections. This authority includes the ability "to question *privately* any . . . employee" (RCW 49.17.070, emphasis added). Historically, L&I has taken a broad view of the privacy afforded by the statute, and has routinely protected both the identity and, frequently, the statements of employees interviewed by inspectors in the course of DOSH inspections.

Chapter 42.56 RCW includes the requirements of the state's Public Records Act (PRA). The PRA generally provides for the release of public agency records, *unless such records are protected against disclosure by one of the exemptions in the PRA or by another statute*. RCW 42.56.070. RCW 42.56.240(1) provides for the protection of investigation records necessary to "effective law enforcement," which, under certain circumstances, may allow DOSH to withhold employee and witness statements.

II. Scope and Application

This WISHA Regional Directive provides guidance to DOSH staff in applying these various statutes to the issue of employee interviews and statements pursuant to a DOSH inspection. It also provides guidance related to the appropriate use of the "Witness Statement" (form number F416-093-000) and the "Statement" (form number F416-016-000). It replaces, but does not substantively change, WISHA Interim Operations Memorandum #97-7-F, issued July 25, 1997, which is hereby rescinded.

III. Interpretive Guidance

- A. Form F416-093-000, issued 05/98 and titled "Witness Statement," must be used *only for investigations of fatalities or catastrophes*. These forms must not be used

for any other purpose. Any remaining stock of form F416-093-000 issued prior to October of 1995 shall be recycled and not used.

- B. Staff conducting accident investigations must make no promises of confidentiality beyond the protection of employee identity to the extent described on form F416-093-000 ("Witness Statement").
- C. Staff conducting routine DOSH inspections may use Form F416-016-000 (issued 04/01 and titled "Statement") for written statements, or they may use other appropriate written means to take such statements.
- D. Whether the "Statement" form is used or not, and whether taking signed statements or simply recording employee/witness interview responses in his or her work notes, the CSHO must do the following prior to designating any employee/witness statement as confidential:
 - 1. Ask employee or witness whether he or she is willing to provide information during an interview if the employer may have access to the information provided by the employee/witness.
 - 2. If the employee/witness is willing to provide information during an interview without confidentiality protection, the CSHO must proceed with the interview without offering or making any other guarantees regarding confidentiality. Such statements shall not be marked as "confidential" in the inspection file.
 - 3. If the employee/witness is unwilling to provide information in an interview without assurances of confidentiality, the CSHO shall indicate in his or her interview notes or statements that the employee/witness is not willing to provide information without guarantee or assurance of confidentiality. The CSHO will also note on the interview form or in his or her work notes that the witness/employee has requested confidentiality. The CSHO shall advise the employee/witness that his or her statement will be marked and confidential and may proceed with the interview.
- E. The CSHO must mark as "Confidential" only those statements and interview notes that include the identity of employees who have requested non-disclosure (if the request is not made by the employee in writing, it must be recorded in the CSHO's notes).
- F. The CSHO may advise an employee who requests that his or her identity be protected that the department will not release the employee's identity as part of a public records request unless ordered otherwise by a court or directed by the Office of the Attorney General. The CSHO must make no further promise of confidentiality.
- G. Public Disclosure staff will honor the expressed preference of any employee and protect the employee's identity by eliminating references to the employee's name or other identifying material or information before releasing the remainder of the

employee's statement. If necessary, Public Disclosure staff will request regional assistance in identifying and eliminating such references.

- H. For statements or interview notes obtained prior to the date of this memo and where no employee preference has been previously obtained, Public Disclosure shall contact the appropriate regional supervisor before releasing employee identities on work notes or statements marked "confidential." The supervisor may use his or her staff to determine an employee preference as necessary.
- I. Whenever confidentiality concerns are particularly acute, staff are strongly encouraged to obtain a *written* request for confidentiality from the employee.

Approved: _____
Stephen M. Cant, CIH, Assistant Director
Department of Labor and Industries
Division of Occupational Safety and Health